

# THE RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008 (CTH): AUSTRALIA'S OWN *DROIT DE SUITE* SCHEME — ROUGH SKETCH OR MASTERPIECE?

---

DAVID PRICE\*

## I. BACKGROUND

On 27 November 2008 the Hon Peter Garret, Minister for the Environment, Heritage and the Arts, introduced the Resale Royalty Right for Visual Artists Bill 2008 (Cth) (the Bill) into Australian Parliament. During the second reading speech of the Bill, he declared that:

the introduction of this Bill marks a landmark day for Australia's visual artists, whose right to an ongoing economic interest in the value of their artistic works will be appropriately recognised in Australia for the first time.<sup>1</sup>

The Bill constitutes the Australian government's attempt to honour an election commitment to introduce an artists' resale royalty right (or *droit de suite* as it is universally known) scheme into the national intellectual property environment. A resale royalty right entitles qualifying artists to receive payment from subsequent sales of their artwork, after its original sale. The royalty is payable whenever a work is re-sold during the artist's lifetime and for 70 years thereafter, consistent with rights applicable to copyright works under the *Copyright Act 1968* (Cth) and related legislation.

Proponents of a *droit de suite* scheme would argue that the Bill, when enacted, will allow visual artists to derive greater economic benefits from their work, as they will benefit from any increase in value when it is resold. Opponents of the scheme, notably the commercial art and art auction industry, would argue that the Bill will have a detrimental economic effect on the Australian art market, imposing an unmanageable financial and administrative burden on it.

In advocating the Bill, the Government asserts that, at present, visual artists do not have access to the intellectual property rights in the multiple reproductions of their works enjoyed by authors, and creators and performers of dramatic and musical works.<sup>2</sup> The Bill is intended to redress this imbalance, and to give effect to the Government's election policy commitment to introduce resale royalty rights for artists.<sup>3</sup>

The Bill is also meant to give effect to the *droit de suite* provisions of art 14ter of the *Berne Convention for the Protection of Literary and Artistic Works* (the Berne Convention).<sup>4</sup>

While a *droit de suite* scheme has a considerable degree of support, notably from the national arts and indigenous arts communities, there is widespread concern that the Bill in its present form will not achieve the outcomes apparently sought by the Minister and sought by the artists themselves. This paper examines the key features of the Bill and questions whether it will achieve its declared objectives. It argues that, while the scheme may be admirable, the Bill is flawed and poorly conceived. In particular, its first resale exclusion provisions and minimum threshold level will bring few, if any, benefits to most of the arts community — particularly so in the case of the indigenous arts community.

---

\* School of Law and Business, Charles Darwin University, [david.price@cdu.edu.au](mailto:david.price@cdu.edu.au).

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2008, 11645 (Peter Garret, Minister for the Environment, Heritage and the Arts).

2 Ibid.

3 Ibid.

4 Ibid. *Berne Convention for the Protection of Literary and Artistic Works*, Paris Act of July 24, 1971, as amended on September 28, 1979.

## II. THE INTERNATIONAL PERSPECTIVE

*Droit de suite* schemes have existed in a number of countries for many years. The first such scheme was enacted in France in the 1920s, after controversy over artists living in poverty while public auction houses profited from the resale of their works.<sup>5</sup>

The legal basis for these various schemes ranges from *sui generis* legislation, amendment to existing copyright legislation and regulation, to voluntary schemes.<sup>6</sup> These schemes vary in content and coverage, with some countries applying a flat royalty rate (France and Germany) while others have chosen a sliding scale (Belgium). A number of countries have minimum qualifying thresholds (for example, the United Kingdom<sup>7</sup>) while others have imposed the royalty on the capital gain of the artwork (Italy and Brazil). Some schemes cover the estates of artists up to 70 years after their death (most European Community countries), while others cover only living artists (United Kingdom<sup>8</sup>). The administration of these schemes varies from state-run/government-owned collecting agencies (Belgium) to privately-operated businesses (France). Coverage can also vary. Some schemes cover only the resale through auction houses, commercial galleries and art houses. The majority of schemes bestow an inalienable right that cannot be transferred or waived, although some schemes allow artists to not enforce their right in specific instances. Coverage can also extend to foreign artists if reciprocal arrangements have been agreed between countries.

In 2001, the European Council adopted *Commission Directive (EC) No 84/2001 of 27 September 2001— On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32 (the Directive) in order to ensure consistency between its member countries and to minimise or eliminate any market distortions between members.<sup>9</sup> The Directive provides for a minimum qualifying sale threshold of €3000, a variable rate on a sliding scale between 4 per cent and 0.25 per cent with a maximum payment of €12,500, calculated on a sale price net of tax.<sup>10</sup> It also provides for the royalty to continue for the life of the artist plus 70 years after his or her death. It also contains reciprocity provisions with non-European Union states offering similar rights.<sup>11</sup>

The New Zealand government introduced the Copyright (Artists' Resale Right) Amendment Bill in 2008 to establish a resale royalty rights scheme.<sup>12</sup> The New Zealand Bill has provisions similar to Australia's scheme, with a five per cent flat royalty rate with no upper limit, a single collection agency, first resale exemption after introduction of the scheme, exclusion of private sales, inalienable rights, and residency and reciprocity provisions.<sup>13</sup> However, the New Zealand Bill has had a troubled passage to date. In March 2009, the Government Administration

5 France, Law of 20 May 1920, amended by Law of 27 October 1922.

6 This brief summary of international *droit de suite* practices is generally taken from *Caslon Analytics Profile: Droit de Suite Europe* <<http://caslon.com.au/droitprofile3.htm>> at 14 December 2009. See also Katy Graddy, Noah Horowitz and Stefan Szymanski, *A Study into the Effect on the UK Art Market of the Introduction of the Artist's Resale Right* (2008) IP Institute (UK) <<http://www.ipo.gov.uk/study-droitdesuite.pdf>> at 14 December 2009.

7 *Artist's Resale Right Regulations 2006* (UK) SI No 346 of 2006, art 12(3)(b). The Regulation sets the minimum threshold at €1000 (and not £sterling).

8 *Artist's Resale Right Regulations 2006* (UK) SI No 346 of 2006, art 17. The UK has exercised its prerogative under art 17 to derogate the extension of the scheme to deceased artists until 2012, on the grounds of uncertain economic conditions.

9 *Commission Directive (EC) No 84/2001 of 27 September 2001 — On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32.

10 *Commission Directive (EC) No 84/2001 of 27 September 2001 — On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32, arts 3, 4(1), 5.

11 *Commission Directive (EC) No 84/2001 of 27 September 2001 — On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32, art 7.

12 Copyright (Artists' Resale Right) Amendment Bill 2008 (NZ).

13 Copyright (Artists' Resale Right) Amendment Bill 2008 (NZ) art 204.

Committee of the New Zealand Parliament recommended by a majority that the Bill not be passed. Parliament has yet to debate the Committee's report.<sup>14</sup>

*Droit de suite* has not enjoyed popularity in the United States either, with no legislative provision at the federal level, and only one State, California, introducing legislation at the State level.<sup>15</sup>

### III. RESALE ROYALTY RIGHT FOR VISUAL ARTISTS BILL 2008 (Cth) — SOME CONTENTIOUS ELEMENTS

In brief, the scheme espoused by the Bill proposes a royalty payment to the artist or creator of an artwork when ownership of that work is transferred through a commercial sale. The royalty is payable during the artist's lifetime and for 70 years thereafter, consistent with rights applicable to copyright works under the *Copyright Act 1968* (Cth). The proposed rate of payment is five per cent, on a minimum qualifying sale price of \$1000.

In the case of existing artwork, the royalty obligation will not apply to the first sale of the artwork after the law comes into force, but will apply to subsequent sales.

Administration of the scheme and enforcement of the collection of royalties is to be undertaken by a Government-appointed collecting society, operating along similar lines to copyright collection agencies. While the royalty right enshrined in the legislation is inalienable and is not subject to waiver, opt-out provisions entitle artists or holders to direct the collecting society not to collect the royalty or enforce the resale royalty right on their behalf.

Following the second reading speech in November 2008, the House referred the Bill to the Standing Committee on Climate Change, Water, Environment and the Arts (the Committee), which reported on 20 February 2009.<sup>16</sup> While the Committee has expressed general support for the Bill and recommended that it proceed, it has also urged that some of the Bill's more contentious provisions be amended, particularly in respect of indigenous artists. The Minister for the Environment, Heritage and the Arts (the Minister) has agreed to implement a few of the Committee's recommendations, but has not accepted some recommendations on certain key issues — including the detail of 'commercial sale', special provisions for indigenous artists, minimum qualifying sales price threshold, inclusion of first resales, and clarification of opt out provisions. These issues are discussed in further detail below.

#### A. Definition of Artwork

Section 7 of the Bill originally defined the nature of an artwork for the purposes of the resale royalty right as follows:

- (1) ... an original work of graphic or plastic art that is either:
  - (a) created by the artist or artists; or
  - (b) produced under authority of the artist or artists.
  
- (2) Works of graphic or plastic art include pictures, collages, paintings, drawings, engravings, prints, lithographs, sculpture, tapestries, ceramics, glassware and photographs.

The Committee reported that this was a rather exclusive definition which had interpretative and operational difficulties. The Minister acted on the Committee's recommendations and

---

14 See New Zealand Ministry for Culture and Heritage, 'Artists' Resale Right' <<http://www.mch.govt.nz/projects/culture/resale-royalty.html>> at 14 December 2009.

15 CAL CIV CODE § 986 (2008). Formerly the *California Resale Royalties Act 1977*, subsequently incorporated into the *California Civil Code*.

16 See Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, *Resale Royalty Right for Visual Artists Bill 2008* (2009) 1.

amended the definition to replace ‘graphic and plastic art’ with ‘works of visual art’, and to add an enhanced list of inclusions.<sup>17</sup> Section 7(2) has now been amended to read:

*Works of visual art* include, but are not limited to, the following: (a) artists’ books; (b) batiks; (c) carvings; (d) ceramics; (e) collages; (f) digital artworks; (g) drawings; (h) engravings; (i) fine art jewellery; (j) glassware; (k) installations; (l) lithographs; (m) multimedia artworks; (n) paintings; (o) photographs; (p) pictures; (q) prints; (r) sculptures; (s) tapestries; (t) video artworks; (u) weavings; (v) any other things prescribed by the regulations.

The list now wisely recognises the potential for artworks in new and emerging mediums by making provision for multimedia, digital and video artworks, although it is unclear whether expressions of forms of artwork (other than the more conventional visual mode) would still come within the purview of the Bill. From the amendment made to s 7(1), it would appear unlikely. The status of artwork that may come within the purview of the copyright designs interface provisions of pt III, div 8 of the *Copyright Act 1968* (Cth) is also uncertain.

It is suggested that the amendment to s 7(1) is a retrograde step which narrows an already limited definition of art and thereby limits the range of possible benefits. A contrast here can be drawn with the *Trade Marks Act 1995* (Cth), in which the term ‘graphic’ replaced the former and more conservative term ‘visual’ used in the 1955 version of the Act in order to extend the range and nature of signs registrable as trade marks, notably colours, sounds, and smells.<sup>18</sup> ‘Graphic or plastic art’ is the term used in both the European Council’s Directive and the United Kingdom Regulations.<sup>19</sup>

### *B. Commercial Resale of an Artwork*

Despite the Minister’s declaration that Australia’s visual artists should be given appropriate recognition and reward for their success, the Bill does not propose to apply a scheme across the whole spectrum of the potential commercial art market. Limits are imposed on the nature and elements of a qualifying resale transaction. While the limits, when considered in isolation, may seem logical, the consequence is that the Bill falls far short of protecting resale royalty rights consistently or comprehensively.

In the first instance, the right applies only in respect of certain types of commercial sales; namely, if:

- (a) ownership of the artwork is transferred from one person to another for monetary consideration; and
- (b) the transfer is not the first transfer of ownership of the artwork; and
- (c) the transfer is not otherwise one of an excluded class.<sup>20</sup>

An excluded class of transfer is one which occurs in circumstances that do not involve an art market professional, acting in that capacity.<sup>21</sup> An ‘art market professional’ is defined as:

- (a) an auctioneer; or
- (b) the owner or operator of an art gallery; or
- (c) the owner or operator of a museum; or
- (d) an art dealer; or
- (e) a person otherwise involved in the business of dealing in artworks.<sup>22</sup>

17 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2009, 8665 (Peter Garrett, Minister for the Environment, Heritage and the Arts)..

18 *Trade Marks Act 1995* (Cth) s 6.

19 *Commission Directive (EC) No 84/2001 of 27 September 2001 — On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32, Preamble [1]; *Artist’s Resale Right Regulations 2006* (UK) SI No 346 of 2006, art 4(1).

20 Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 8(1).

21 Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 8(2).

22 Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 8(3). This could include the manager of a major private or corporate art collection, according to the Explanatory Memorandum.

This is a very exclusive list — in effect, a commercial resale occurs only when artworks are resold by auction or private treaty through art auction houses, art galleries and art dealers. The list may include sales between private parties and public institutions, but it does not include private sales between individuals, nor sales by or involving organisations not mainly in the business of dealing in artworks. By this definition, general auctioneers who sell artworks as part of deceased estates, general consignments or bankruptcies, would not be deemed to be art market professionals. Presumably, the Bill would also exclude sales from mixed businesses where the principal or agent is not an art market professional acting in that capacity, and the primary commercial activity is not art sales — such as tourist accommodation, hotels, internet cafes and souvenir outlets, open air markets and the like — all of which together provide a significant commercial outlet for indigenous art particularly in outback regions of Australia.

Secondly, the royalty is not payable on works created after the Bill comes into force and sold for the first time, although it may apply to the subsequent resale. In the case of works created or acquired before the Bill comes into force, the royalty is not payable on the first transfer of title or resale of the work after that date, even if this is otherwise a commercial resale (see further discussion below at Part C).

Curiously, the first transfer of title, according to the Bill's Explanatory Memorandum, includes transfers from the artist by sale, gift, exchange for goods or services, or inheritance, since including all such categories would avoid situations in which artists are pressured to exchange their works rather than sell them at the first point of transfer to delay triggering the resale royalty right until the third transfer of ownership.<sup>23</sup> Yet such transactions are excluded from the commercial resale prescription of s 8 and its operation, since such resales must be made for monetary consideration.

The Committee has recommended that s 8(3)(d) be amended to reflect the full range of transactions involving the commercial resale of artwork and to broaden the definition of art market professional to include 'art market dealer' (in lieu of 'art dealer') in order to capture other commercial operators whose primary business may not be artwork but who nonetheless sell artwork regularly. To date, the Minister has agreed to this proposal only in part, and has yet to enunciate how s 8(3) might be amended. He has indicated that the intention of the scheme will be clarified through the Explanatory Memorandum, rather than the Bill, in respect of these commercial operators.<sup>24</sup> At the same time, he has asserted that the Government does not intend to include in the scheme businesses which do not operate principally in the art market but which sell artworks on an occasional or intermittent basis.<sup>25</sup>

### *C. Treatment of Existing Artwork*

Section 11 of the Bill provides that:

If an artwork exists on the commencement of this Part, there is no resale royalty right on the first transfer of ownership of the artwork on or after commencement, even if the transfer of ownership is under a commercial resale.

Hence, the first transfer of ownership of any such artwork is excluded, irrespective of whether this transfer is private or commercial in nature. This raises the question of determining how the first royalty liability is to be identified, recorded and enforced. Without some legally valid record of a first transfer between parties — whether by commercial sale or even by succession, it will be difficult for the collecting society administering the scheme to determine the first commercial resale that incurs the royalty obligation. The application of the royalty liability to

---

23 Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008 (Cth) 5.

24 Australian Government Response to the House of Representatives Standing Committee on Climate Change, Water Environment and the Arts Report, Parliament of Australia, *Resale Royalty Right Bill for Visual Artists 2008* (2009) 3.

25 Ibid.

all commercial resales after the commencement, including the first resale, would obviate this difficulty.

Section 11 is a crucial element of the Bill, and has attracted considerable critical attention since the Bill's introduction and particularly during the Committee's review. Supporters of the scheme decry the retention of s 11 because, they argue, it will seriously undermine the short- to medium-term benefits to most visual artists and will deny the current generation of artists any significant royalties at all.<sup>26</sup>

The Minister's declared reason for including s 11 is that a prospective application of the resale right will help protect the rights of people who bought artwork unaware that a resale royalty would be payable on its subsequent resale.<sup>27</sup> He said that:

Importantly the right will only apply to resales of artworks that are acquired after the right comes into effect. This is to ensure that purchasers of artworks are aware at the time they make their purchase that a royalty may be payable to the artist if they choose to resell the work. It will also allow the art market to adapt gradually to the new right.<sup>28</sup>

If the Australian art market had a reasonably frequent turnover of artwork, the uptake of royalty probably would not be a serious issue since the scheme would cover the great majority of resales in the medium term. An Access Economics report commissioned by the Department of Environment, Water, Heritage and the Arts (DEWHA) in April 2008 to assess the impact of the scheme on the art market, assumed average periods of two, five and 10 years between resales. Based on these assumptions, the report appeared to suggest that the scheme would cover all resales within a few years.<sup>29</sup>

However, studies by the Arts Law Centre of Australia and Viscopy, as members of the Coalition for a Resale Royalty (CARR), indicate that the average first resale of an artwork occurs closer to 20 years. Using auction sales data for 1998 to 2008, CARR has argued that, if the proposed prospective scheme had been applied during this period, only six per cent of artwork sold within this period would have been resold by 2008.<sup>30</sup> Hence, it is likely to be around 40 years before most artists would benefit from the resale of their artwork under the current terms of the Bill. Many artists would be unlikely to see their artwork resold and therefore would not benefit from either a retrospective or prospective scheme.

A constitutional issue apparently drives the decision to exclude the first resale of existing artwork, according to the Committee. The Minister has reportedly received legal advice to the effect that the application of the resale royalty to existing artwork comes within the scope of s 51(xxxi) of the *Constitution* — the acquisition of property on just terms.<sup>31</sup> If a legal challenge

26 See Submissions to the Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, *Resale Royalty Right for Visual Artists Bill 2008* (2009) (Dean Bowen, 1, Pippin Drysdale, 1, and Rosslynd Piggott, 1).

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2008, 11645 (Peter Garrett, Minister for the Environment, Heritage and the Arts).

28 *Ibid.*

29 Access Economics, 'Design Aspects of an Australian Resale Royalties Scheme', 7 April 2008, as cited by the Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 14.

30 Coalition for a Resale Royalty (CARR), 'Resale Royalty Right for Visual Artists Bill 2008' (Briefing Paper, CARR, 2008) 2

<<http://www.visualarts.net.au/files/AO8n30.pdf>> at 14 December 2009. Again, using Viscopy studies data, only 845 artists would have benefited and shared in a total royalty payment of \$4.6 million under the current terms of s 11. However, if the royalty applied to all resales, the number of beneficiaries would rise substantially with 2456 artists sharing in \$35.4 million. See Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, app 1.

31 See Australian Government Response to the House of Representatives Standing Committee on Climate Change, Water Environment and the Arts Report, above n 24, 3. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2009, 8667 (Peter Garrett, Minister for the Environment, Heritage and the Arts).

were mounted, the High Court could hold the application of the resale royalty to an existing artwork to be acquisition of property on other than just terms, and find the Bill constitutionally invalid. The inclusion of s 11 in its present form no doubt reflects that advice and is a strategy to avoid the possible risks arising from this potential constitutional issue. But opponents of the scheme might also view the Minister's actions as deference to the influence of the art dealer industry. In November 2008, the media reported that the Government might face a High Court challenge by the auction houses if it attempted to make the scheme retrospective. Such a challenge would have significantly delayed the Bill's planned introduction in July 2009.<sup>32</sup>

Legal advice presented to the Committee by CARR and other witnesses reinforce the opposing view that there is little or no risk of the Bill contravening s 51(xxxi).<sup>33</sup> The advice suggests that any risk of constitutional complication could be addressed by including a provision in the Bill for compensation in the event that it results in the acquisition of property on other than just terms, akin to provisions recently added to the *Copyright Act 1968* (Cth).<sup>34</sup>

The Minister agreed to seek further legal advice on the constitutional implications of ss 11 and 20, on the recommendation of the Committee. While he would not disclose the nature of either the original legal advice or the subsequent advice on the grounds that such action is contrary to Government policy, the Minister stated that he considered the current draft legislation constitutionally valid. However, he argues that the removal of s 11 and amendment to s 20 would still expose the Commonwealth to significant legal risk.<sup>35</sup> The Minister's agreement to seek further legal advice at a late stage of the Bill's passage and his acknowledgement that the Explanatory Memorandum needed clarification seems to indicate a lack of full examination at the consultation and drafting stages of the Bill, and undue haste to introduce it into the House in the first place.

Removal of s 11 in its present form would enable the royalty to apply to all art resales, although this course of action would still require amendment to s 8(1) of the Bill.

#### D. Sale Price Threshold and Royalty Rate

The Bill establishes a five per cent royalty rate, with a minimum qualifying sale price threshold of \$1000.<sup>36</sup> The 'sale price' is defined as the amount paid for the artwork by the buyer on the commercial resale. It includes GST, but does not include any seller's commission, charges additional to a sale price or auction 'hammer price' imposed on the buyer by way of buyer's premium, or any other tax payable on the sale.<sup>37</sup>

32 Katrina Strickland, 'Resale Royalties May Face Constitutional Hitch', *Australian Financial Review* (Sydney), 21 August 2008, 7. See also Parliamentary Library, *Bills Digest 74 2008–09 Resale Royalty Right for Visual Artists Bill 2008* (2009) 8 <[http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/LVMS6/upload\\_binary/lvms60.pdf;fileType=application/pdf#search=%22Resale%20Royalty%20Right%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/LVMS6/upload_binary/lvms60.pdf;fileType=application/pdf#search=%22Resale%20Royalty%20Right%22)> at 14 December 2009.

33 See Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, above n 16, app D.

34 The *Copyright Act 1968* (Cth) s 116AAA provides for compensation to be payable by a performer rather than by the government. Section 116AAA relates to amendments made in 2005, granting performers a share in the copyright in existing sound recordings, where the copyright had previously been wholly owned by another party.

35 See Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2009, 8667 (Peter Garrett, Minister for the Environment, Heritage and the Arts).

36 Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 10(1).

37 Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 10(2). 'Buyer's premium' is an additional charge levied by the auction house on the buyer, and generally calculated as a percentage of the auction hammer price. It is common practice in general, motor vehicle, and fine art auctions. The original scheme, as outlined in the DEWHA 2008 discussion paper, suggested that the royalty be calculated on the sale price net of all taxes. DEWHA advised the Committee that the inclusion of the GST was based on Treasury advice: see Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 12–13.

According to the Explanatory Memorandum to the Bill, the royalty should be based on the sale price that most closely reflects the value of the artwork.<sup>38</sup> If this is the case, then the Copyright Agency Limited, the Art Law Centre, and the Australian Commercial Galleries Association (ACGA) would argue that the sales price should include buyer's premium since this price best reflects the full price paid by the buyer.<sup>39</sup> However, the Minister and the Committee argue that the royalty rate should be calculated on a price that is easy to identify and is understood by all parties to the transaction, and suggests that the actual sales price, plus 10 per cent GST, best fits that description.<sup>40</sup> They also argue that this formula most closely reflects the real value of the artwork.

Sales price alone would also fit that description. Inclusion of the GST in the definition of sale price in fact reduces the ticket price or hammer price at which the royalty comes into effect to \$910 rather than \$1000, a consideration that is likely to catch unawares many sellers and buyers alike. Most schemes, possibly for administrative ease, have opted to use the actual resale price (whether higher or lower than the previous sale price) on which to calculate the royalty.<sup>41</sup>

CARR<sup>42</sup> has recommended that the minimum qualifying threshold be lowered to \$500 on the grounds that the lower threshold would increase the amount of royalties for visual artists.<sup>43</sup> While a threshold reduction may increase the number of benefiting artists, the royalty collection costs can (and will) increase significantly and be charged back to the artists by the collecting agency with detrimental effect on the payment the artist actually receives.

The commercial art gallery industry has suggested that the maximum royalty payable be no more than \$12,500, irrespective of the sale price of the artwork, or that a sliding scale along similar lines to the European Community scheme should apply.<sup>44</sup> However, this proposal is clearly an effort to limit the application of the scheme. The majority of *droit de suite* schemes adopt a flat rate, with the majority of those again settling for a rate of five per cent.<sup>45</sup>

### *E. Treatment of Indigenous Artwork*

The Minister has emphasised that protection be afforded to indigenous artists, declaring that:

the scheme ... is also aimed at increasing the transparency of the art market to prevent exploitation of artists, particularly indigenous artists, by unscrupulous dealers.<sup>46</sup>

The high prices received in a few examples of indigenous artwork over recent years has caused attention to be focussed on the Bill's capacity to bring into the indigenous art market what supporters of a *droit de suite* scheme would argue are some degree of equitable rights — that

38 Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008 (Cth) 8.

39 Submissions to the Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, *Resale Royalty Right for Visual Artists Bill 2008* (2009) 6 (Copyright Agency Ltd); 11 (Arts Law Centre of Australia); 3 (Australian Commercial Galleries Association).

40 Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008 (Cth) 6; see also Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 12.

41 See *Caslon Analytics Profile: droit de suite Europe*, above n 6. See also Katy Graddy, Noah Horowitz and Stefan Szymanski, above n 6.

42 CARR, above n 30.

43 Ibid. See also Viscopy, *Implications of the Australian Government's Proposed Resale Royalty Scheme* (2008) 14 <<http://www.viscopy.com/pdffdocuments/implicationsofproposedresalescheme.pdf>> at 14 December 2009.

44 The EC scheme provides for a variable rate ranging from 4 per cent for a sale up to 12,000 Euros, to 0.25 per cent for sale prices exceeding 500,000 Euros, with a maximum royalty not exceeding 12,500 Euros: *Commission Directive (EC) No 84/2001 of 27 September 2001 — On the Resale Right for the Benefit of the Author of an Original Work of Art* [2001] OJ L 272/32, art 4.

45 Viscopy, above n 43, 14. See also Arts Law Centre of Australia, <<http://www.artslaw.com.au/ArtLaw/Archive/2008/08ProposedResaleRoyalty.asp>> at 14 December 2009.

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2008, 11645 (Peter Garrett, Minister for the Environment, Heritage and the Arts).



is, to allow the creators along with the purchasers/owners to continue to reap the benefits from escalating prices in indigenous artwork. The recent sale of the late Clifford Possum Tjapaltjarri's *Warlulgulong* has often been cited as a prime example of what has been described as the 'obscurity of the art market'.<sup>47</sup> Clifford Possum first sold the painting for \$1200 in 1977. It was subsequently resold in 1996 for \$36,000, and again in 2007 for \$2.4 million. Neither he nor his family received any moneys from these resales. Nor would they receive any royalties from the possible next sale after the Bill came into force if s 11 remains in its present form.

The Bill does not draw any distinction between non-indigenous and indigenous art.<sup>48</sup> Nor does it contain special provisions, protections or exemptions to give particular redress to the perceived particular exploitation of indigenous artists. It had been argued before the Committee that, in order to ensure that royalty benefits are spread as widely as possible across the indigenous arts community, the first resale exemption should be removed, and the threshold reduced to \$500.<sup>49</sup> Based on auction house sales figures in the first half of 2008, had the scheme been operating during that period with these enhancements in place, it would have delivered \$3 million worth of resale royalties to 800 artists. Thirty per cent of the recipients would have been indigenous.<sup>50</sup> The 2007 figures for artworks sales by Australian artists reveal that 24 per cent of those artists were indigenous.<sup>51</sup> Clearly, removing the first sale exemption and lowering the threshold would benefit the indigenous arts communities.

CARR and others have proposed that special provision should be made in the Bill for indigenous artists, to take account of the particular arrangements that generally exist between the artists and indigenous arts centres, whereby some centres pay artists up front for their work.<sup>52</sup> Since the next sale from the centre, creating the royalty payment obligation under the scheme proposed by the Bill, could be within a short period of time, centres may reduce the initial payment to the artist. The galleries themselves have suggested that these unintended consequences could be overcome by a special 'resale exemption' which excludes resales of artwork that occur within a specified period after the 'primary' sale under certain conditions.<sup>53</sup>

Quite reasonably, the Government has declined to introduce such special arrangements.<sup>54</sup> Providing an exclusion period would simply delay exercise of the royalty right and its payment. The exclusion period could well serve as a 'loophole' for the exploitation of indigenous artists. It would also unnecessarily complicate and confuse a scheme that is already complex. The absence of a special arrangement exclusion period may actually encourage more transparent practice in the art market, particularly in the indigenous art sector.

An issue arises in respect of succession of title for the works of indigenous artists. Sections 15(1) and 15(2) cover normal tests with respect to the rules of intestate succession. However, it has been suggested that the Bill should recognise intestate succession according to indigenous customary law to allow communal ownership of indigenous artwork.<sup>55</sup> While the Commonwealth has the power under s 51(xxvi) of the Constitution to make special laws for people of any race for whom it is deemed necessary to make such laws, and could presumably act under this provision, rules of succession and intestacy fall under state and territory responsibility. The

47 Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, above n 16, 26.

48 The word 'indigenous' appears only once in the whole of the Bill.

49 Viscopy, above n 43, 15.

50 Coalition for a Resale Royalty (CARR), above n 30, 2.

51 Ibid.

52 Ibid. See also Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 28.

53 Submission to the Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, *Resale Royalty Right for Visual Artists Bill 2008* (2009) 2 (Australian Commercial Galleries Association).

54 Australian Government Response to the House of Representatives Standing Committee on Climate Change, Water Environment and the Arts Report, above n 24, 6–7.

55 Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 28–9.

amendment may also lead to significant difficulties in the scheme's administration, particularly since there is no uniform body of indigenous customary law and it may be difficult to determine whether particular persons have received rights in accordance with that law.

#### *F. Inalienability of the Right and the Collecting Society*

Section 33 expressly states that, except to the extent permitted under the succession test, the resale royalty right is absolutely inalienable, whether by way of sale, assignment, charge, execution, bankruptcy, insolvency or otherwise. Section 34 stipulates that a waiver of a resale royalty is of no effect. The declared purpose of these sections is to provide artists, particularly indigenous artists, with a safeguard against being pressured into surrendering their right to obtain a royalty on the resale of their artwork.<sup>56</sup> Although inalienability alone does not create a moral right, the resale royalty right is akin to copyright moral rights provisions. The section also establishes a succession test which allows the artist to pass on the right to a charitable institution that works for the benefit of the community under certain conditions. Section 33 is given practical effect by the creation under s 35 of an agency for the collection of the resale royalty.

Notwithstanding s 33, holders of resale rights enjoy a right under s 23(1) not to use the collecting society or even enforce the resale royalty right on their behalf. Section 23(1) permits a collecting society to collect the royalty unless the right holder notifies it in writing that 'the collecting society is not to collect the resale royalty, or enforce the resale royalty right ... on behalf of the holder or holders of the right.' This provision has been promoted as an option that equally protects young and vulnerable artists from being forced into waiving possible future rights, and protects older artists from being forced into automatic support of the management of the scheme.<sup>57</sup> However, the provision in fact creates uncertainty and ambiguity over the scheme's application in the real world.

Section 23 appears to be inconsistent with ss 33 and 35, insofar as the opt-out options of s 23(1) appear to be at odds with the intent of inalienable rights and the commitment to establish one collecting society pursuant to s 35. A disjunct arises between the existence of an established right and of a means to obviate it in its practical application. Particularly in the case of indigenous artists, the consequence will likely be that the artists will not be aware of this loophole and its implications, and their agents — smaller gallery owners in the main — will decide on their behalf.

It is unclear whether s 23(1) gives artists the right to collect the royalty themselves, or even the discretion to forego the royalty enforcement and collection altogether, notwithstanding the unequivocal directive of s 33.<sup>58</sup> If such right does exist, the Bill is silent on the powers that individual artists or their agents might have with respect to the right to demand information or payment. And if artists use the collecting society on a case by case basis, as also appears to be an option under s 23(1), it is not unrealistic to envisage a scenario where there is confusion as to which artworks are the responsibility of an artist for royalty collection and administration and which artworks are the responsibility of the collecting society. Whatever the real intention of s 23, it is suggested that the section requires re-examination to remove these internal uncertainties, ambiguities and inconsistencies with other pertinent sections of the Bill.

The administration fees, which the collecting society has the discretion to set and the authority to deduct from the royalty collected, will no doubt reflect the administrative burden in managing a scheme in which a number of options would likely be operating contemporaneously.<sup>59</sup> While the Bill does not set parameters or actual scales of charges, it does enable the Minister to limit the fee imposed.<sup>60</sup> Industry experience and indications from other *droit de suite* schemes indicate

<sup>56</sup> Explanatory Memorandum, Resale Royalty Right for Visual Artists Bill 2008 (Cth) 18.

<sup>57</sup> *Ibid* 19.

<sup>58</sup> Viscopy, above n 43, 9.

<sup>59</sup> Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 26(1).

<sup>60</sup> Resale Royalty Right for Visual Artists Bill 2008 (Cth) s 26(3).

that fees could be within the range of 10–20 per cent of sale price, although the fees in some overseas countries have been as high as 40 per cent.<sup>61</sup> A complex scheme and a small market would create a fee at the upper end of the range — as will be the case in the Australian context. As with any new scheme, costs are likely to be high in the early years of the scheme.

With these differing options and artists exercising their rights in a variety of ways, the resale royalty collection scheme could end up becoming virtually unmanageable.

### *G. International Reciprocity*

Section 52 provides for the Bill to give effect to the Berne Convention. In so doing, it recognises the *droit de suite* provisions of art 14*ter* of the Convention and enables them to be given local effect.<sup>62</sup> Article 14*ter* provides that:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

In other words, Australian artists whose works are sold in a country which has a *droit de suite* scheme in force and with which Australia has established mutual recognition agreements, may claim a royalty on the sale of their works, in accordance with local *droit de suite* provisions. By the same token, foreign artists from countries which have *droit de suite* legislation in force and whose works are sold in Australia would be entitled to claim similar rights under Australian provisions. To enjoy this reciprocal arrangement, Australia must comply with the requirements of art 14*ter*(2), and have its own *droit de suite* scheme in operation.

As the Minister has advised:

Because the right is recognised in the Berne Convention for the Protection of Literary and Artistic Works, it will be possible for Australia to establish arrangements with other countries which acknowledge the right to a royalty for Australian artists whose work is sold in those countries.<sup>63</sup>

However, it is worth noting that art 14*ter*(1) of the *Berne Convention* provides that artists shall enjoy the inalienable right to an interest in any sale of the work subsequent to *the first transfer* by the author of the work, and not the second resale as proposed by the Bill in respect of artworks already in existence. Hence, the Australian scheme is not consistent with *Berne Convention* provisions.

Both the International Confederation of Societies of Authors and Composers (CISAC) and Viscopy claimed in evidence to the Committee that, because of the prospective nature of the proposed scheme and the consequential limited application in its early years, other countries may not enter into a reciprocal arrangement with Australia.<sup>64</sup> Both CISAC and Viscopy have argued that there is a risk that the proposed Australian scheme would not be viewed as a ‘fully functioning scheme’ by the European Community for reciprocity purposes:

---

61 Submission to the Standing Committee on Climate Change, Water, Environment and the Arts, Parliament of Australia, *Resale Royalty Right for Visual Artists Bill 2008* (2009) 3, 37 (Australian Commercial Galleries Association).

62 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 November 2008, 11645 (Peter Garrett, Minister for the Environment, Heritage and the Arts).

63 Ibid.

64 Viscopy, above n 42, 15; see also CISAC as cited by the Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 25.

It is not difficult to envisage a view being formed of the effect of clause 11 of the Bill not in reality providing such protection, with the consequent effect of disempowering Australian artists to the proceeds of schemes in place in Europe.<sup>65</sup> (emphasis in original)

The existence of this possible risk may be alarmist rather than substantial, and part of the campaign against s 11 in its present format — it would be in the best interests of artists and their agents in all reciprocating countries to exercise their mutual reciprocal rights rather than fail to collaborate on the basis of apparent differences between the respective schemes. Mutual recognition of reciprocity and cooperation in its application will also work against a possible royalty avoidance strategy of moving artworks for sale to those countries, such as the United States, where *droit de suite* schemes are not in place or where reciprocity provisions on resales are not in effect. Mutual application of reciprocal rights by a significant number of countries would also militate against resale royalty schemes having any substantial negative effect on sale prices because of the royalty payment obligation.

#### IV. CONCLUDING REMARKS

Even on the basis of the information currently in the public domain, it is difficult to see how the scheme as crafted will achieve its declared objectives. While the scheme may be admirable, the Bill is flawed and poorly conceived. In particular, its first resale exclusion provisions and \$1000 minimum threshold level will bring little, if any, benefit to a significant proportion of the art market (particularly to indigenous artists) in the medium term. Generally, it proposes a scheme that in practice has a level of complexity and uncertainty to militate against its universal, consistent and transparent management.

The operation of the scheme as crafted in the Bill is unlikely to create an industry of avoidance by transfer of transactions to countries without similar laws or reciprocity arrangements. The likelihood of a flood of artwork sales to overseas markets was argued by opponents of the United Kingdom's *droit de suite* scheme, but those fears have been shown to be unfounded.<sup>66</sup> A report in 2008 commissioned by the United Kingdom Intellectual Property Office has revealed that there is no evidence of a diversion of art sales business away from the United Kingdom or a diminution of the United Kingdom market since the introduction of that jurisdiction's scheme.<sup>67</sup> In any case, the shortcomings in the detail of the Bill and supporting documentation should allow opportunity for the royalty obligation to be bypassed by those inclined to do so. Perhaps this could be done either by manipulating sale prices below the minimum threshold level, by creating or using pseudo-private markets (such as E-bay or other online internet auction and sales sites), or by utilising sales outlets which fall outside the Bill's prescription of a 'commercial resale' undertaken by an 'art market professional'.

How might the Bill be strengthened? Some suggestions have already been made in the discussion in the preceding sections. The following are some initiatives that I suggest will improve the scheme and its operation, and enhance the benefits flowing back to the artist or royalty right holder:

- extend the definition of commercial resales to include the first transfer of ownership or resale (that is, remove the s 8(1) limitations);
- remove the art market professional restriction by extending it to encompass all commercial operators in the artwork market, including those operating in the digital or online auction markets (that is, remove the s 8(2) limitations);

---

65 CISAC, as cited by the Standing Committee on Climate Change, Water, Environment and the Arts, above n 16, 26.

66 See Katy Graddy, Noah Horowitz and Stefan Szymanski, above n 6, 49–50.

67 Ibid 35–38.

- establish a royalty rate that can be easily understood (that is, based on the ticket price or auction hammer price, which is more representative of the true value of an artwork and is simpler), and which excludes GST;
- apply the royalty obligation to all transfers of ownership or resales after the law comes into effect (that is, remove the s 11 exclusion on first resale of existing artworks);
- in light of the corpus of legal opinion and precedent in respect of s 11 and its possible interpretations, allow due judicial processes to determine the constitutionality or otherwise of the Bill or the section;
- reduce the minimum qualifying threshold level to \$500 (that is, amend s 10(1));
- clarify the operation of the opt-out provision in respect of the collecting society role (ss 23(1) and 23(2));
- strengthen regulatory limits and controls on collecting society charges (s 26(1)); and
- provide ongoing government funding for the scheme.

The Minister has indicated that the scheme will be subject to a review after five years of operation. If the Viscopy modelling data on turnover of artworks in the resale market are even reasonably accurate, there may be little by way of substance for a review of the scheme. However, it may allow a review of the legislation and create an opportunity to improve this first attempt at a *droit de suit* scheme — assuming, of course, that a change in the political dynamics and environment does not generate a drastic change in the current direction of the Bill.

Debate on the Bill in Parliament has recently resumed after a lengthy adjournment. Both before and after adjournment, the Opposition has maintained pressure on the Government over the Minister's handling of the introduction and passage of the Bill.<sup>68</sup> The Opposition's contributions, rather unfortunately have added little substance to the serious debate over the scheme from a legislative perspective, focussing more on the Minister's alleged shortcomings than the Bill's merits or inadequacies. The Bill has yet to pass through the Senate, but the Opposition has already indicated that it will require substantive change before it will become acceptable.<sup>69</sup> It is also quite likely that the Bill will be used as political ammunition to attack both the Minister and the Government — in which case, both the Bill and its intended beneficiaries will end up as the collateral damage.

## V. POSTSCRIPT

The Resale Royalty for Visual Artists Bill 2008 (Cth) was passed by the Parliament on 26 November 2009. The scheme will commence six months after the date of Royal Assent, or on a date to be fixed by proclamation. The Bill passed through the Senate without further amendment in addition to the amendments earlier agreed to by the Minister, and discussed above.

---

68 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2009, 3347 (Steven Ciobo, Shadow Minister for Small Business, Independent Contractors, Tourism and the Arts); Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2009, 8665 (Steven Ciomo, Shadow Minister for Small Business, Independent Contractors, Tourism and the Arts).

69 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 2009, 8665 (Steven Ciomo, Shadow Minister for Small Business, Independent Contractors, Tourism and the Arts).